IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 12 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL MAFABHAI @ VIRCHAND - Appellant(s)
Versus
GOSAI GANPATGAR MOHANGAR - Defendant(s)

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Appearance :

MR PINAKIN PATEL with MR RP BHATT for Appellant(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.2.6, 1.2.7, 1.2.8,1.2.9
None for Respondent

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 06/12/2006

ORAL JUDGMENT

1. Mr. Pinakin Patel with Mr. M.R. Bhatt, learned counsel for the appellants. None for the

respondent though served.

2. The appellants-defendants have filed the present Second Appeal which has been admitted for hearing on the following substantial question of law.

> [1] Whether the appellate court has erred in law and on facts in proceeding on the basis that in the appeals, the opinion of the trial Judge about the credibility of witnesses should not be ordinarily disturbed and the appellate court should not re-appreciate the oral evidence and arrive at the opinion contrary to that of trial Judge?
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> [2] When original plaintiff was using the field of revenue survey no.220 for going to revenue survey no. 218 on admitted facts, whether the courts below were justified in conferring upon the original plaintiff right of way in the form of easement right from the field of survey no. 218 of the defendant and restraining the defendant from

obstructing the plaintiff to pass through the field of the defendant?”

3. One Gosai Ganpatgar Mohangar had filed the suit in the court of learned Civil Judge [Junior Division], Patan claiming right of way over the defendant's land. The defendant appeared before the court and submitted that the plaintiff had no right of way and under the circumstances, the suit was liable to be dismissed. It is to be noted that the plaintiff is the owner of survey no. 218 while the defendants own survey no. 219. The plaintiff had filed an application before the Mamlatdar, seeking right of way, but the said application was rejected. Thereafter, the appeal also suffered the same fate, therefore, the suit came to be filed. The defendants appeared before the court and submitted that the plaintiff had no right of way. However, the learned trial court, after recording the evidence and hearing the parties came to the conclusion that the plaintiff was successful in proving his case, it accordingly decreed the

suit and restrained the defendants from obstructing the plaintiff from passing over the western side of field bearing survey no. 219. Being aggrieved by the said judgment and decree, the appellants preferred Regular Civil Appeal, which came to be dismissed on 31.8.95.

4. Learned counsel for the appellants submits that from the facts it would clearly appear that the learned first appellate court erred in law and on facts in holding that the opinion recorded by the learned trial court could not be interfered with. His submission is that the said court being final court of facts was required to reappreciate the evidence and could not simply say that the findings recorded by the first appellate court were justified.

5. From a perusal of the judgment passed in Regular Civil Appeal No. 59/81, it would clearly appear that after framing the points for determination, the first appellate court considered the entire evidence led by both the parties and in para-8 onwards discussed the reliability of the evidence. It is not that the first appellate

court has simply rejected the appeal in one line order. Even otherwise, it is trite to hold that the first appellate court, if is in general agreement with the findings recorded by the trial court, then it has to simply consider the evidence and confirm the findings and nothing beyond that. The first question will have to be answered against the interest of the appellants.

6. So far as the second question is concerned, it can straightaway be answered against the interest of the appellant because the two courts on evidence have found that the plaintiff has perfected his right of easement and is entitled to cross through the land of survey no. 219 which belongs to the present appellants. A right of way in cases of adjoining fields, if is not made available to a person to enjoy his property, then user of the property would become impossible and it may lead to many problems. In the present case, the two courts have properly appreciated the evidence and have recorded correct findings. The appeal deserves to and is accordingly dismissed. No costs. Interim relief,

if any, stands vacated.

7. Decree be framed accordingly.

[R.S. GARG, J.]

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